In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00379-CR

KENNETH WAYNE DOLLERY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 253rd District Court
Liberty County, Texas
Trial Cause No. CR26275

MEMORANDUM OPINION

A jury convicted Kenneth Wayne Dollery of capital murder. The trial court sentenced him to life in prison without parole. On appeal, Dollery argues that his counsel was ineffective at trial, that the trial court abused its discretion in allowing an out-of-court statement to be admitted into evidence as an excited utterance, and that there is insufficient corroboration of accomplice testimony to sustain the conviction. Finding no error, we affirm the trial court's judgment.

THE FACTS

A deputy constable found Barney Goodman's body on the side of the road by a bridge. Goodman had sustained a laceration to the head. His legs had been amputated from a prior injury, and his prosthetic legs were missing. He was naked, traumatized, in a state of panic, and had labored breathing. He had difficulty speaking. He told the deputy constable that he was brought there by two white males from Baytown in a 1980's model primer-gray Chevy truck. They had beaten him over the head with an object. Goodman thought he had been there somewhere between eight and twelve hours. He was transported by air ambulance to a hospital where he died. Goodman's prosthetic legs were later recovered below the bridge. Dollery was convicted for the capital murder of Goodman.

THE CONFESSION

Dollery claims his trial counsel failed in not having his mental state evaluated and in not moving to suppress his confession. During the confession, Dollery made statements that he had a "hard time comprehending stuff because I got hit by a car when I was two years old", "[s]o I have a hard time reading and writing", and "since I got hit by the car, I'm having a hard time remembering stuff." He asserts that regardless of whether the issue of his competency was brought to the trial court's attention, "the trial court has the *sua sponte* obligation to conduct a competency inquiry if the issue is raised during the course of the trial."

"A person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." Tex. Code Crim. Proc. Ann. art. 46B.003(a) (West 2006). "A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." *Id.* art. 46B.003(b). If evidence suggesting that a defendant may be incompetent to stand trial comes to the attention of the trial court, the court must determine, by an informal inquiry, "whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." *Id.* art. 46B.004(c) (West 2006). This informal inquiry must be conducted if the trial court has "a *bona fide* doubt about the competency of the defendant[.]" *Montoya v. State*, 291 S.W.3d 420, 425 (Tex. Crim. App. 2009). A *bona fide* doubt may exist if the defendant exhibits truly bizarre behavior or has a recent history of severe mental illness or at least moderate mental retardation. *Id.*

An appellate court applies an abuse of discretion standard when reviewing a trial court's failure to conduct an inquiry into a defendant's competency to stand trial. *Id.* at 426. The statements Dollery cites do not raise a bonafide doubt as to his competency. *See id.* at 425; *Moore v. State*, 999 S.W.2d 385, 395 (Tex. Crim. App. 1999). We see no abuse of discretion by the trial court in not inquiring *sua sponte* about Dollery's competency.

Appellate courts review claims of ineffective assistance of counsel under the standards set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must show his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id*.; *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008). "In evaluating the first component, reviewing courts must not second-guess legitimate strategic or tactical decisions made by trial counsel in the midst of trial, but instead 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" *Morales*, 253 S.W.3d at 696 (quoting *Strickland*, 466 U.S. at 689). Unless the record sufficiently demonstrates that counsel's conduct was not the product of a tactical or strategic decision, we "presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *Id*. at 696-97 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). An appellate court's review of ineffective assistance claims is "highly deferential" to trial counsel, as we presume "that counsel's actions fell within the wide range of reasonable and professional assistance." *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007) (citing *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); *Chambers v. State*, 903 S.W.2d 21, 33 (Tex. Crim. App. 1995)). "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively

demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Dollery did not file a motion for new trial. Absent an evidentiary hearing in which defense counsel is provided the opportunity to explain his actions and trial strategy, we generally must presume that counsel rendered reasonably effective assistance. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Issue one is overruled.

DECEDENT'S STATEMENT

Dollery maintains the trial court abused its discretion in allowing into evidence the deputy constable's testimony that Goodman told him he had been brought to the remote location by "two white males in a '80s model primer[-]gray Chevy truck from Baytown." Dollery argues the evidence was hearsay. The trial court admitted the testimony under the excited utterance exception to the hearsay rule. *See* Tex. R. Evid. 803(2).

Hearsay is an out-of court statement offered into evidence to prove the truth of the matter asserted. *See* Tex. R. Evid. 801(d). An excited utterance under Texas Rule of Evidence 803(2) constitutes one exception to the hearsay exclusion rule. *See* Tex. R. Evid. 803(2). An excited utterance is a statement that relates to a startling event or condition, and is made when the declarant is still under the stress of excitement caused by the event or condition. *Id.; Kesaria v. State*, 148 S.W.3d 634, 642 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 189 S.W.3d 279 (Tex. Crim. App. 2006).

The pivotal inquiry in deciding whether a statement is an excited utterance "'is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event.'" *Lawton v. State*, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995) (quoting *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)). The time elapsed between the occurrence of the event and the utterance is only one factor considered in determining the admissibility of the hearsay statement. *Id.* That the declaration was a response to questions is likewise only one factor to be considered and does not alone render the statement inadmissible. *Id.* Goodman was under the stress of excitement caused by the events, having been severely beaten and exposed to the environment. The trial court could reasonably conclude the statement met the requirements of the exception set forth in Rule 803(2). *See* Tex. R. Evid. 803(2) (excited utterance); *see also* Tex. R. Evid. 804(b)(2) (dying declarations). Issue two is overruled.

THE ACCOMPLICE TESTIMONY

Dollery argues Hollis Buckley, Jr. was an accomplice to the crime and "[w]ith the elimination of the oral interrogation/confession of [Dollery] and the elimination of the testimony of [Buckley], there is not sufficient corroboration" to support Dollery's conviction. The jury charge instructed that Buckley was an accomplice as a matter of law if any offense was committed, and that the jury could not find Dollery guilty based on Buckley's testimony unless they believed there is other evidence in the case tending to connect Dollery with the offense charged.

The Code of Criminal Procedure requires a conviction based upon the testimony of an accomplice witness to be corroborated by other evidence that tends to connect the defendant with the offense. Tex. Code Crim. Proc. Ann. art. 38.14 (West 2005). When evaluating whether accomplice witness testimony is sufficiently corroborated, we eliminate the accomplice testimony from consideration and examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime. *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). The corroborating evidence need not directly connect the accused to the crime nor be sufficient by itself to establish guilt; it need only tend to connect the defendant to the offense. *See Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999); *Trevino v. State*, 991 S.W.2d 849, 851 (Tex. Crim. App. 1999).

Dollery argues that in addition to eliminating Buckley's testimony we must also eliminate Dollery's confession because his confession was admitted without a competency inquiry. We reject the argument that a competency inquiry was required. Dollery's confession may be considered along with the other evidence in determining whether there is any evidence that tends to connect Dollery to the crime.

In his confession, Dollery stated that his aunt took Goodman's money and then Dollery and Buckley kidnapped Goodman and took him under the bridge. Goodman removed his prosthetic legs, Buckley hit Goodman in the head with a baseball bat, and

Buckley dragged Goodman into the river. Dollery threw Goodman's prosthetic legs into the river.

Dollery's girlfriend at the time of the murder testified that Dollery had mentioned wanting to join the Aryan Brotherhood prior to the murder of Goodman. The same night of the murder and after Goodman's body had been discovered, Dollery stopped by her place of employment and they talked. He told her "[t]hat he got his marks." When she asked him what he was talking about, he said, "Don't worry about it."

On the day of the murder, footage from a bank camera portrayed Dollery and Goodman together withdrawing money at an ATM machine. Goodman told the deputy constable that the men who had dropped him under the bridge were "two white males in a '80s model primer[-]gray Chevy truck from Baytown." The vehicle description matched Dollery's truck.

Sufficient evidence corroborates Buckley's testimony. Issue three is overruled. The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on August 27, 2010
Opinion Delivered January 19, 2011
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Before McKeithen, C.J., Gaultney, and Kreger, JJ.